

**PLAINTIFFS’
RESPONSE TO
GOOGLE’S
ADMINISTRATIVE
MOTION DKTS. 642, 646**

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BOIES SCHILLER FLEXNER LLP

David Boies (admitted *pro hac vice*)
 333 Main Street
 Armonk, NY 10504
 Tel: (914) 749-8200
 dboies@bsfllp.com

Mark C. Mao, CA Bar No. 236165
 Beko Reblitz-Richardson, CA Bar No. 238027
 Erika Nyborg-Burch, CA Bar No. 342125
 44 Montgomery St., 41st Floor
 San Francisco, CA 94104
 Tel.: (415) 293-6800
 mmao@bsfllp.com
 brichardson@bsfllp.com
 enyborg-burch@bsfllp.com

James Lee (admitted *pro hac vice*)
 Rossana Baeza (admitted *pro hac vice*)
 100 SE 2nd St., 28th Floor
 Miami, FL 33131
 Tel.: (305) 539-8400
 jlee@bsfllp.com
 rbaeza@bsfllp.com

Alison L. Anderson, CA Bar No. 275334
 725 S Figueroa St., 31st Floor
 Los Angeles, CA 90017
 Tel.: (213) 995-5720
 alanderson@bsfllp.com

SUSMAN GODFREY L.L.P.

William C. Carmody (admitted *pro hac vice*)
 Shawn J. Rabin (admitted *pro hac vice*)
 Steven M. Shepard (admitted *pro hac vice*)
 Alexander Frawley (admitted *pro hac vice*)
 1301 Avenue of the Americas, 32nd Floor
 New York, NY 10019
 Tel.: (212) 336-8330
 bcarmody@susmangodfrey.com
 srabin@susmangodfrey.com
 sshepard@susmangodfrey.com
 afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891
 1900 Avenue of the Stars, Suite 1400
 Los Angeles, CA 90067
 Tel.: (310) 789-3100
 abonnn@susmangodfrey.com

MORGAN & MORGAN

John A. Yanchunis (admitted *pro hac vice*)
 Ryan J. McGee (admitted *pro hac vice*)
 201 N. Franklin Street, 7th Floor
 Tampa, FL 33602
 Tel.: (813) 223-5505
 jyanchunis@forthepeople.com
 rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805
 711 Van Ness Ave, Suite 500
 San Francisco, CA 94102
 Tel: (415) 358-6913
 mram@forthepeople.com

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
 JEREMY DAVIS, CHRISTOPHER
 CASTILLO, and MONIQUE TRUJILLO
 individually and on behalf of all similarly
 situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' RESPONSE TO
 GOOGLE'S ADMINISTRATIVE
 MOTION DKTS. 642, 646**

Referral: The Honorable Susan van Keulen

INTRODUCTION

Plaintiffs appreciate the Court's careful attention to these Google data preservation issues, including with its order earlier today setting a hearing for August 4. *See* Dkt. 647. For the reasons set forth in this submission, Plaintiffs believe that Google's Administrative Motion (Dkt. 642) should be denied. To the extent the Court is inclined to grant Google any extension, Plaintiffs agree that Google should in the meantime preserve any and all data subject to the Preservation Order. Any extension should not result in any Google data destruction.

First, Plaintiffs note that they have no way to reasonably evaluate what Google is requesting, or the need for any further relief. Google did not produce any of the preservation methodologies at issue as part of fact or expert discovery, nor did Google produce anything regarding how it was sampling or selecting the preserved data. No Google expert put forth any report or testimony regarding what has or has not been preserved or why. Plaintiffs only have the very limited say-so submitted by Google, requesting the relief.

Second, Plaintiffs were unable to obtain additional information through the meet and confer process. Plaintiffs followed up with Google on July 28, 2022, to further inquire about fundamental issues raised by Google's request, but Google stated it would only provide a response today, the day this filing is due. As of the close of business on the East Coast, Google still had not provided any responses. Plaintiffs therefore have no additional information to offer.

Third, Plaintiffs note that additional preservation may be required. As will be addressed in Plaintiffs' forthcoming August 4 filing (per Dkt. 624), Google on June 14, 2022 revealed for the first time that it tracks users' private browsing in [REDACTED] previously undisclosed logs, and uses that data for Google's various business purposes. Dkt. 614-2 (the "Sramek Declaration"). Google uses these logs with private browsing bits [REDACTED]

[REDACTED] Dkt. 614-2 ¶¶ 6-10. Google's request does not address these logs or data at all, and Google has refused to even meet and confer about preservation of that data.

1 Plaintiffs hope that some of these additional issues can be addressed on August 4th.

2 **BACKGROUND**

3 At the start of this litigation, Plaintiffs asked Google to preserve all relevant data; Google
4 in turn insisted on doing nothing to preserve any data. Dkt. 546. Google also insisted on limiting
5 Plaintiffs' discovery to just the data of class representatives (Dkt. 544), refusing even small
6 samples of relevant data such as those relating to the X-Client Data header.

7 In March 2022, in response to the Court's order, Google for the first time made a proposal
8 regarding data preservation—limited to samples of data. Mao Decl. ¶¶ 5-6. Plaintiffs sought
9 preservation of all relevant data, and Google instead proposed sampling. Dkts. 544, 546.

10 On May 3, 2022, the Court held a hearing on Google's proposed preservation plan and
11 Plaintiffs' objections. Dkt. 572. No part of what Google recently raised as technical difficulties in
12 its Administrative Motion was raised at the hearing, or in any filing for the hearing.

13 On May 20, 2022, the Court entered the Preservation Order, adopting in part and modifying
14 in part the Special Master's recommended preservation plan, which included part of Google's
15 sampling proposal. Dkt. 587. Again, Google did not raise any difficulties with its proposed
16 sampling plan, or any of the technical issues it raised in the last few days.

17 On May 27, 2022, Google sought "clarification" of the Preservation Order. Dkt. 591.
18 Again, Google did not then raise any of the technical issues raised in its July 27 Motion.

19 Google has never produced to Plaintiffs any of the data, encryption keys, or methodologies
20 at issue in the Motion, instead limiting Plaintiffs' access to just Plaintiffs' data. *E.g.*, Dkt. 311 at 5
21 (summarizing Plaintiffs' requests for class member data, and Google's insistence that data
22 productions be limited to data from the named Plaintiffs); Mao Decl. ¶ 14.

23 Google did not serve any expert report using the data or encryption keys at issue, and no
24 opinion was proffered regarding what was allegedly preserved or not, or how that impacts this
25 litigation. Mao Decl. ¶ 14.

26 On June 14, 2022, via the Sramek Declaration, Google belatedly revealed that it tracks
27 users' private browsing in [REDACTED] previously undisclosed logs, and uses that data for Google's various
28

business purposes. Dkt. 614-2. Mr. Sramek did not address whether or how Google would preserve data and encryption keys for any of those additional logs. *Id.*

Prior to July 27, 2022, Google participated in many meet-and-confers and hearings and made multiple submissions to this Court related to sampling, including:

- March 14, 2022: Google first proposed sampling as part of a preservation plan;
- March 15, 2022: Google provided a written high-level sampling proposal;
- March 22, 2022: Google provided a more detailed sampling proposal;
- April 4, 2022: the Special Master filed his report and recommendation that included a modified version of sampling that Google requested (Dkt. 524);
- April 15, 2022: the parties provided their objections and responses to the Special Master's report and recommendation (Dkts. 544, 546);
- May 2, 2022: the Court clarified the scope of its upcoming hearing concerning the Special Master's report and recommendation (Dkt. 567);
- May 3, 2022: the Court held a hearing on the Special Master's report and recommendation (Dkt. 572);
- May 20, 2022: the Court entered its order on the preservation plan (Dkt. 587);
- May 27, 2022: Google sought clarification of the Court's preservation plan (Dkt. 591);
- June 9, 2022: the Court asked Google to respond to two discrete issues: first, the requirement for Court permission prior to shortening retention periods for any data source; and second, the requirement for preservation of rolling encryption keys (Dkt. 604);
- June 21, 2022: Google responded to the Court's June 9 inquiry (Dkt. 613); and
- July 15, 2022: the Court clarified the preservation plan (Dkt. 630).

Mao Decl. ¶¶ 5-6.

It was not until July 27, 2022—nearly five months after Google first proposed sampling for preservation and participated in no fewer than 12 events related to sampling (*i.e.*, meet-and-confers, hearings, and filings)—that Google took the position that some sampling was not possible, and the design and implementation for other sampling would take substantially more time than the Court allotted. Google has not produced any documentation or technical specifications regarding its alleged difficulties, and Plaintiffs have no way to assess Google's alleged difficulties.

Counsel for the parties met and conferred on July 27. During that meet and confer, Google's counsel represented that Google needed more time to design the preservation mechanism and even more time to conduct the backfill. Mao Decl. ¶ 9. No other issues were raised, including the now-revealed issues with GAIA and DBL. *Id.*

1 Plaintiffs' counsel asked Google's counsel how the logs and data referenced by the Sramek
 2 Declaration would be addressed by Google's Motion, and Google's counsel said Google will not
 3 address the issue until Google files its response to Plaintiffs' forthcoming sanctions filing (with
 4 Plaintiffs' filing due August 4 and Google's response due August 18, per Dkt. 624). Mao Decl. ¶
 5 10.

6 On July 28, 2022, after Google filed its Administrative Motion, Plaintiffs posed nine
 7 questions to Google seeking additional information about assertions in Google's Motion, but
 8 Google said it would not respond until the day Plaintiffs' response is due. Mao Decl. ¶¶ 11-12. As
 9 of the close of business on the East Coast, Google has not provided any response to any of
 10 Plaintiffs' questions. Plaintiffs will evaluate any response upon receipt. *Id.* ¶ 13.

11 ARGUMENT

12 While Plaintiffs would ordinarily not object to modest extensions, this Motion is unique in
 13 that it deals with Google's Court-ordered preservation obligations – based in part on a proposal
 14 Google made many months ago. These issues were already litigated and decided. The Court
 15 provided sufficient time to comply with the Preservation Order, in full, and any further delay is
 16 unwarranted.

17 Plaintiffs otherwise have no way to reasonably evaluate what Google is requesting as part
 18 of this Motion, including any changes to its preservation obligations. Google did not produce any
 19 of the data or methodologies at issue as part of fact or expert discovery, and no Google expert
 20 opined on what has or has not been preserved nor what that preserved data might implicate.

21 Google also only belatedly produced the Sramek Declaration, which identifies relevant
 22 logs and information not previously subject to preservation considerations or obligations. When
 23 confronted with how the Motion would affect the data referenced by the Sramek Declaration,
 24 Google refused to meet and confer. Mao Decl. ¶ 10. Thus, neither the Court nor the Plaintiffs have
 25 any way of evaluating the full ramifications of what Google is requesting.

26 The Preservation Order was issued based on Google's representations and assurances,
 27 allowing sampling over Plaintiffs' objections for full preservation. Google should not be rewarded
 28

1 for its attempt to seek last-minute relief from its own proposed sampling and representations, while
2 refusing to provide Plaintiffs with critical information through a meet and confer process.

3 **CONCLUSION**

4 Plaintiffs respectfully request that the Court deny Google's Administrative Motion (Dkt.
5 642) and order Google to comply with the Preservation Order.

6
7 Dated: August 4, 2022

Respectfully submitted,

8 By: /s/Mark Mao

9 Mark C. Mao (CA Bar No. 236165)
10 mmao@bsfllp.com
11 Beko Reblitz-Richardson (CA Bar No. 238027)
12 brichardson@bsfllp.com
13 Erika Nyborg-Burch (CA Bar No. 342125)
14 Enyborg-burch@bsfllp.com
15 BOIES SCHILLER FLEXNER LLP
16 44 Montgomery Street, 41st Floor
17 San Francisco, CA 94104
18 Telephone: (415) 293 6858
19 Facsimile (415) 999 9695

20 David Boies (*pro hac vice*)
21 dboies@bsfllp.com
22 BOIES SCHILLER FLEXNER LLP
23 333 Main Street
24 Armonk, NY 10504
25 Telephone: (914) 749-8200
26 James W. Lee (*pro hac vice*)
27 jlee@bsfllp.com

28 Rossana Baeza (*pro hac vice*)
rbaeza@bsfllp.com
BOIES SCHILLER FLEXNER LLP
100 SE 2nd Street, Suite 2800
Miami, FL 33130
Telephone: (305) 539-8400
Facsimile: (305) 539-1304
Alison L. Anderson (CA Bar No. 275334)
alanderson@bsfllp.com
BOIES SCHILLER FLEXNER LLP
725 S Figueroa St., 31st Floor
Los Angeles, CA 90017
Telephone: (213) 995-5720
Facsimile: (213) 629-9022

1 William Christopher Carmody (*pro hac vice*)
2 bcarmody@susmangodfrey.com
3 Shawn J. Rabin (*pro hac vice*)
4 srabin@susmangodfrey.com
5 Steven Shepard (*pro hac vice*)
6 sshepard@susmangodfrey.com
7 Alexander P. Frawley (*pro hac vice*)
8 afrawley@susmangodfrey.com
9 SUSMAN GODFREY L.L.P.
10 1301 Avenue of the Americas, 32nd Floor
11 New York, NY 10019
12 Telephone: (212) 336-8330

9 Amanda Bonn (CA Bar No. 270891)
10 abonn@susmangodfrey.com
11 SUSMAN GODFREY L.L.P.
12 1900 Avenue of the Stars, Suite 1400
13 Los Angeles, CA 90067
14 Telephone: (310) 789-3100

13 John A. Yanchunis (*pro hac vice*)
14 jyanchunis@forthepeople.com
15 Ryan J. McGee (*pro hac vice*)
16 rmcgee@forthepeople.com
17 MORGAN & MORGAN, P.A.
18 201 N Franklin Street, 7th Floor
19 Tampa, FL 33602
20 Telephone: (813) 223-5505
21 Facsimile: (813) 222-4736

19 Michael F. Ram, CA Bar No. 104805
20 MORGAN & MORGAN
21 711 Van Ness Ave, Suite 500
22 San Francisco, CA 94102
23 Tel: (415) 358-6913
24 mram@forthepeople.com

23 *Attorneys for Plaintiffs*